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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 RANDY JAMES PEREZ,) Case No. CV 15-9279-PJW
11 Plaintiff,)
12 v.) MEMORANDUM OPINION AND ORDER
13 CAROLYN W. COLVIN,)
14 ACTING COMMISSIONER OF THE)
15 SOCIAL SECURITY ADMINISTRATION,)
16 Defendant.)
17

18 I.

19 INTRODUCTION

20 Plaintiff appeals a decision by Defendant Social Security
21 Administration ("the Agency"), denying his claim for Supplemental
22 Security Income ("SSI"). He claims that the Administrative Law Judge
23 ("ALJ") erred when he: (1) rejected the treating doctor's opinion;
24 (2) determined that Plaintiff and his mother were not credible; and
25 (3) found that Plaintiff could work. For the reasons explained below,
26 the ALJ's decision is reversed and the case is remanded to the Agency
27 for further proceedings consistent with this opinion.
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II.

SUMMARY OF PROCEEDINGS

In August 2011, Plaintiff applied for SSI, alleging that he had been unable to work since December 31, 2002, due to chronic lower back pain, Hepatitis C, hypertension, and insomnia. (Administrative Record ("AR") 226-34, 257.) The Agency denied the applications initially and on reconsideration. (AR 87, 97.) Plaintiff then requested and was granted a hearing before an ALJ. (AR 130-31.) On February 27, 2013, he appeared with counsel and testified at the hearing. (AR 48-50, 52-69.) On March 19, 2013, the ALJ issued a decision denying his application for benefits. (AR 98-112.)

Plaintiff appealed the ALJ's decision to the Appeals Council, which vacated the decision and remanded the case to the ALJ to further evaluate Plaintiff's mental impairment, reconsider the testimony of Plaintiff's mother, further evaluate the doctors' opinions after updating the record, develop the record regarding Plaintiff's past work, and, if warranted, obtain testimony from a vocational expert. (AR 114-16.)

On March 25, 2015, Plaintiff appeared with counsel at a second hearing before a different ALJ. (AR 31-42.) On June 26, 2015, the ALJ issued a decision denying Plaintiff's application for benefits. (AR 12-28.) Plaintiff appealed to the Appeals Council, which denied review. (AR 1-6.) This action followed.

III.

ANALYSIS

A. The Residual Functional Capacity Determination

The ALJ found that Plaintiff had the residual functional capacity to perform light work if it involved only occasional bending and

1 stooping. (AR 18.) Plaintiff objects to this finding. He contends
2 that, in order to reach this conclusion, the ALJ improperly rejected
3 the opinion of one of Plaintiff's treating doctors and discounted
4 Plaintiff's and his mother's testimony without cause. (Joint Stip. at
5 9-22, 37-43.) For the following reasons, the Court remands this issue
6 to the Agency for further consideration.

7 1. The Treating Doctor's Opinion

8 In January 2013, Plaintiff's treating doctor, Dr. William
9 Edelstein, diagnosed Plaintiff with chronic lower back pain and
10 concluded that he could occasionally lift, carry, or pull less than
11 ten pounds; stand or walk for a total of less than two hours in an
12 eight-hour day; and sit continuously for less than six hours. (AR
13 380.) He also opined that Plaintiff could not reach repeatedly and
14 that he would miss 60 to 120 hours of work per month. (AR 380.)
15 According to Dr. Edelstein, Plaintiff's condition had persisted for 13
16 years. (AR 380.)

17 Had the ALJ accepted Dr. Edelstein's opinion, he would have had
18 to conclude that Plaintiff was not even capable of performing full-
19 time sedentary work. But the ALJ rejected Dr. Edelstein's opinion
20 because: (1) it was not supported by objective medical evidence; and
21 (2) it was undermined by the opinions of treating doctor John
22 Landsberg, consultative examiner Ursula Taylor, and two reviewing
23 doctors. (AR 21.) Ultimately, the ALJ concluded that Plaintiff could
24 perform light work. Plaintiff argues that the ALJ erred in
25 discounting Dr. Edelstein's opinion.

26 It is the province of the ALJ to resolve conflicts in the medical
27 evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
28 There are three types of doctors that supply that evidence: treating

1 doctors, examining doctors, and reviewing doctors. All things being
2 equal, treating doctors' opinions are entitled to the most weight
3 because they are hired to cure and have more opportunity to know and
4 observe the patient. *Id.* at 1041. Examining doctors are next on the
5 list, followed by reviewing doctors. See *Lester v. Chater*, 81 F.3d
6 821, 830-31 (9th Cir. 1995). ALJs, however, are not required to
7 merely accept the opinion of any doctor and, where an opinion is
8 contradicted, may reject it for specific and legitimate reasons that
9 are supported by substantial evidence in the record. *Id.* at 830.

10 In rejecting Dr. Edelstein's opinion, the ALJ noted that, though
11 a treating doctor's opinion is normally entitled to significant
12 weight, that rule is only applicable if the opinion is supported by
13 objective medical evidence. (AR 21.) He then went on to explain
14 that, "such is not the case regarding the assessment of Dr. Edelstein
15 of extreme physical limitations of 13 years duration (Exhibit 8F)."
16 (AR 21.) In the ALJ's view, there was "no objective medical evidence
17 to support such a restrictive residual functional capacity"
18 (AR 21.)

19 Plaintiff complains that the ALJ's finding that Dr. Edelstein's
20 opinion was not supported by the objective medical evidence was too
21 general to be upheld on appeal. The Court agrees in part and
22 disagrees in part. Clearly there is no objective medical evidence
23 dating back to 2000 to support Dr. Edelstein's opinion that
24 Plaintiff's condition persisted for 13 years. In fact, the medical
25 records from the Santa Barbara County Health Department, where Dr.
26 Edelstein worked and where he treated Plaintiff, only go back to 2010.
27 (AR 337-41, 377-429.) Thus, the ALJ's finding that there was no
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1 objective medical evidence to support Dr. Edelstein's 2013 opinion
2 that Plaintiff's condition had persisted for 13 years is affirmed.

3 The ALJ's companion finding that there was no objective medical
4 evidence to support Dr. Edelstein's restrictive residual functional
5 capacity finding is not. There is some objective evidence in the
6 record that supports Dr. Edelstein's view, for example, his positive
7 findings in straight leg testing, and some that undermines it. The
8 ALJ was tasked with sorting through the evidence and explaining which
9 evidence undermined Dr. Edelstein's opinion and which evidence
10 supported it. His failure to do so amounts to error. See *Rodriguez*
11 *v. Bowen*, 876 F.2d 759, 762 (9th Cir. 1989) ("Merely to state that a
12 medical opinion is not supported by enough objective findings 'does
13 not achieve the level of specificity our prior cases have required,
14 even when the objective factors are listed seriatim.'") (quoting
15 *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988)).

16 The ALJ also questioned Dr. Edelstein's opinion because it was
17 inconsistent with the opinions of treating doctor Landsberg (who took
18 over Plaintiff's treatment in February 2013), examining doctor Ursula
19 Taylor, and the reviewing doctors. Generally speaking, this is a
20 valid reason for questioning a treating doctor's opinion. *Andrews*, 53
21 F.3d at 1043 (upholding ALJ's rejection of treating doctor's opinion
22 based in part on the fact that it was contradicted by opinions of
23 nontreating doctors). And it is supported in part by the record. Of
24 the five doctors involved in this case, only one, Dr. Edelstein,
25 concluded that Plaintiff was so severely disabled that his physical
26 limitations precluded him from performing even sedentary work. (AR
27 380.) Three of the other four opined that Plaintiff could lift at
28 least 20 pounds, walk for six hours in an eight-hour day, and sit for

1 at least six hours, which translates into being able to perform light
2 work. (AR 83-84, 93, 360.) Dr. Landsberg did not offer an opinion on
3 Plaintiff's residual functional capacity. He did, however, stop
4 prescribing Plaintiff the narcotic Norco soon after he started
5 treating Plaintiff, which could be interpreted as an indication of his
6 view on the severity of Plaintiff's back pain.

7 The ALJ also explained that he relied on these other doctors
8 based on the "length, nature and extent of the treating relationship,
9 supportability with medical signs and laboratory findings, consistency
10 with the record, and area of specialization." (AR 21.) The ALJ
11 failed, however, to explain what he meant by this. For example, Dr.
12 Edelstein clearly had the longest relationship with Plaintiff. He
13 treated Plaintiff from September 2010 to February 2013. Dr. Taylor,
14 the examining doctor, only saw him once and that was for an
15 examination, not treatment. The reviewing doctors never saw him at
16 all. Dr. Landsberg's treatment notes cover a period of about six
17 months. Thus, to the extent that the ALJ discounted Dr. Edelstein's
18 opinion based on the length and nature of the treatment, the ALJ erred
19 here, too, because Dr. Edelstein treated Plaintiff for the longest
20 and, therefore, that would have been a reason to rely on his opinion.

21 The ALJ also questioned Dr. Edelstein's opinion because the
22 minimal objective medical evidence there was--an "MRI indicating
23 minimal to mild degenerative changes to the lumbosacral spine"--did
24 not support his view that Plaintiff was disabled. (AR 21.) The Court
25 does not find this reason persuasive. None of the doctors opined that
26 these findings establish that Plaintiff's back condition is not
27 painful or debilitating. It appears that this conclusion was the
28 ALJ's alone.

1 Though the Court considers this a close call, it concludes that
2 remand is warranted for the ALJ to take another look at this issue.
3 In doing so, he should explain what medical evidence undermines Dr.
4 Edelstein's opinion and what the basis for that view is. For example,
5 if the apparently unremarkable MRI findings establish that Plaintiff's
6 back condition is not as severe as Plaintiff and Dr. Edelstein claim,
7 then the ALJ should point to evidence in the record that substantiates
8 that finding. The ALJ should also obtain Plaintiff's most recent
9 medical records and consider them in determining whether Plaintiff is
10 disabled.

11 2. The ALJ's Credibility Determination

12 The ALJ found that Plaintiff was not credible. Plaintiff argues
13 that the ALJ erred in doing so. For the following reasons, this
14 finding is remanded for further consideration.

15 ALJs are tasked with judging a claimant's credibility. *Andrews*,
16 53 F.3d at 1039. In doing so, they can rely on ordinary credibility
17 techniques. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).
18 Where there is no evidence of malingering, however, they can only
19 reject a claimant's testimony for specific, clear, and convincing
20 reasons that are supported by substantial evidence in the record.
21 *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014).

22 Plaintiff suffers from sciatica and testified that he has back
23 pain every day. (AR 35.) He claims that he can sit for only two
24 hours at a time and can walk for only about five minutes before he has
25 to rest. (AR 40.) He alleges that he uses a cane and a back brace
26 when his back goes out once or twice a month, which causes pain that
27 lasts up to two weeks. (AR 41.) According to Plaintiff, his back can
28 go out when he is washing dishes or reaching to put a dish into the

1 cupboard. (AR 41.) As a result of his ailments and his insomnia, he
2 only sleeps three to four hours a night. (AR 42.)

3 The ALJ found that Plaintiff's sciatica could reasonably be
4 expected to cause his alleged symptoms but that his testimony that his
5 symptoms were debilitating was not entirely credible because: (1) his
6 ability to perform daily activities was inconsistent with his alleged
7 limitations; (2) the objective medical evidence did not support his
8 alleged degree of back pain; (3) he did not comply with treatment; and
9 (4) his treatment was conservative. (AR 20, 21.) These are valid
10 reasons for questioning a claimant's testimony. See *Orn v. Astrue*,
11 495 F.3d 625, 639 (9th Cir. 2007) (holding ALJ can consider claimant's
12 ability to perform daily activities in assessing credibility); *Rollins*
13 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (noting ALJ can
14 consider objective medical evidence in determining credibility of
15 claimant); *Orn*, 495 F.3d at 638 (explaining ALJ may consider
16 claimant's failure to follow prescribed course of treatment in
17 evaluating testimony about severity of pain); *Meanel v. Apfel*, 172
18 F.3d 1111, 1114 (9th Cir. 1999) (holding inconsistency between
19 allegations of severe pain and conservative treatment was proper basis
20 for discounting credibility). As explained below, however, not all of
21 them are supported by substantial evidence in the record.

22 The ALJ questioned Plaintiff's claim that he could only walk for
23 five minutes because his purported daily activities--including
24 cleaning and vacuuming--"required more than [five] minutes of
25 walking." (AR 20-21.) The Court does not agree with the ALJ's
26 finding here. Plaintiff could have performed these chores in short
27 intervals over the course of a day, particularly, where, as here, he
28 was not working and was spending his days at home.

1 The government points out that Plaintiff told Dr. Edelstein that
2 he was biking and walking seven days a week for exercise. (AR 389.)
3 Clearly, this level of daily activity is inconsistent with Plaintiff's
4 testimony that he suffered from debilitating pain that rendered him
5 incapable of working. But the ALJ did not rely on this when analyzing
6 Plaintiff's credibility and, as such, the Court is not at liberty to
7 do so here. See *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001)
8 ("[W]e cannot affirm the decision of an agency on a ground that the
9 agency did not invoke in making its decision.") (citation omitted).

10 The ALJ relied on the absence of objective medical evidence
11 supporting Plaintiff's alleged pain to find that Plaintiff was not
12 credible. The problem with this finding is that the ALJ failed to
13 specify what evidence was missing and how the lack of it undermined
14 Plaintiff's testimony. To the extent that he was referring to the
15 benign findings in the MRI, the Court is not convinced, absent expert
16 testimony, that that establishes that Plaintiff was not experiencing
17 pain and limitation. The ALJ also failed to explain how the other
18 objective evidence that was there, for example, the positive straight
19 leg raising test results from Dr. Edelstein, did not support
20 Plaintiff's testimony.

21 The ALJ also questioned Plaintiff's sincerity because he failed
22 to follow medical advice. There is evidence in the record to support
23 this finding. Dr. Landsberg noted that Plaintiff essentially refused
24 to listen when he counseled him to start using different sleep
25 medication. (AR 422, 426-27.) This could be construed as a sign that
26 Plaintiff's pain and suffering was not as severe as he claimed. But
27 Plaintiff's resistance here involved his insomnia medication, not his
28 pain medication. And, though the insomnia and the pain from the

1 sciatica may have been related, the Court cannot conclude that
2 Plaintiff's failure to take his insomnia medication proves that his
3 statements about his back pain are exaggerated.

4 The ALJ pointed to the fact that Plaintiff received conservative
5 treatment for what Plaintiff claimed was a debilitating back ailment.
6 The Court sides with the ALJ here. The medical record in this case is
7 sparse. It consists of a handful of treatment notes from Santa
8 Barbara Health Care Center from 2010 to 2013 in which Plaintiff went
9 to see Dr. Edelstein and complained about a bad back, insomnia, high
10 blood pressure, and anxiety and Dr. Edelstein prescribed medications
11 to treat his conditions. There are no records before 2010, despite
12 the fact that Plaintiff claims that he has been disabled since 2002.
13 There were no procedures performed on his back. He did not receive
14 any injections. He did not receive any physical therapy. He simply
15 reported to Dr. Edelstein on an infrequent basis and received
16 medication. Though the medication Dr. Edelstein prescribed for
17 Plaintiff's back pain was a narcotic, Norco, there is no indication in
18 Dr. Edelstein's records that anything more was ever done to treat
19 Plaintiff's condition. Further, soon after Dr. Landsberg took over
20 Plaintiff's treatment, he stopped prescribing Norco.

21 Plaintiff purportedly used a back brace and a cane to treat his
22 back pain. But there is no evidence to indicate that either were
23 prescribed and, even assuming that they were, the Court would
24 characterize them as conservative treatment, also.¹

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26
27 ¹ It appears that Plaintiff was referred to a pain specialist by
28 Dr. Landsberg (AR 418) but there are no records from the pain
specialist.

1 In the end, some of the reasons cited by the ALJ are supported by
2 the record and some are not. Because the Court is not convinced that
3 the reasons that stand are enough to reject Plaintiff's testimony, the
4 issue is remanded to the ALJ for further consideration. See *Carmickle*
5 *v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008)
6 (holding error is harmless only if substantial evidence remains to
7 support the ALJ's credibility finding).²

8 3. Lay Witness Testimony

9 Plaintiff's mother submitted a written report, explaining what
10 she perceived were Plaintiff's limitations. (AR 275-78.) The ALJ
11 discussed her report but failed to explain whether he was accepting it
12 or rejecting it. It seems fair to conclude, however, that the ALJ
13 rejected parts of her "testimony" because his findings relating to
14 what Plaintiff could do are inconsistent with what Plaintiff's mother
15 reported that he could do. The Agency concedes that the ALJ failed to
16 properly address the mother's testimony but argues that, because her
17 testimony was so closely aligned with Plaintiff's, the ALJ's reasons
18 for rejecting Plaintiff's testimony can and should be applied to the
19 mother's.

20 The Court has remanded the issue of Plaintiff's credibility to
21 the ALJ. Thus, the Agency's argument that the Court should uphold the
22 ALJ's rejection of the mother's testimony for the same reasons it is
23 upholding the rejection of Plaintiff's testimony necessarily fails.

24
25 ² The ALJ also seems to conclude that Plaintiff's mother's
26 testimony undermined Plaintiff's testimony. (AR 21.) The Court does
27 not see much difference between what Plaintiff reported and what his
28 mother reported. (AR 263-70, 275-82.) In fact, their written
reports, which were signed on the same day, closely mirror each other.
(AR 263-70, 275-82.)

1 On remand, the ALJ should consider the mother's input as well and
2 explain what weight, if any, he gives it and why. See *Nguyen v.*
3 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) ("[L]ay witness testimony
4 as to a claimant's symptoms . . . is competent evidence" which the
5 Secretary must take into account.) (emphasis in original) (citations
6 omitted).

7 B. Plaintiff's Past Relevant Work

8 Plaintiff contends that the ALJ erred in concluding that he could
9 perform his past work as a medical file clerk because the job is
10 defined as light work and Plaintiff is only capable of performing
11 sedentary work. On remand, after addressing the issues outlined
12 above, the ALJ will have to take another look at Plaintiff's residual
13 functional capacity and then determine whether he can perform his past
14 work.

15 C. The ALJ's Alternative Finding at Step Five

16 The ALJ also made an alternative finding that Plaintiff could
17 perform other jobs existing in the national economy, such as cashier
18 II and marker (retail). (AR 22-23.) Plaintiff argues that both of
19 these jobs involve frequent reaching, handling, and fingering and,
20 therefore, are beyond his ability to do sedentary work. (Joint Stip.
21 at 51-52.)

22 The Court does not find Plaintiff's argument persuasive. The ALJ
23 did not limit Plaintiff to frequent reaching, handling, and fingering,
24 nor did he limit him to sedentary work. That being said, if the ALJ
25 makes a different residual functional capacity determination on
26 remand, he will have to to reconsider Step Four and, if warranted,
27 Step Five, as well.

IV.

CONCLUSION

For the reasons set forth above, the Agency's decision is reversed and the action is remanded for further consideration consistent with this Memorandum Opinion and Order.³

IT IS SO ORDERED.

DATED: February 8, 2017.



PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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³ Plaintiff has requested that the case be remanded for an award of benefits. (Joint Stip. at 53.) The Court recognizes that it has the authority to do so but finds that such relief is not warranted here. See *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015), as amended (Feb. 5, 2016) ("Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits."). Plaintiff purports to have suffered from a debilitating back condition for more than 13 years and yet submits only a handful of medical records, which consists of treatment notes from 2010-2013. He alleged in a written report in September 2011 and in his testimony in February 2013 that he is practically incapacitated, being barely capable of sitting for more than two hours and claimed to spend his days doing very little. (AR 263-70.) Yet, he told his doctor in October 2012 that he was exercising seven days a week, riding a bike and walking. (AR 389.) In the end, the Court concludes that the medical records clearly do not support Plaintiff's claim that he has been disabled since 2002. The only issue for remand is whether the few records that are there from 2010 forward are enough to support a claim for disability for some period. Further administrative proceedings are necessary before that question can be answered.